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Supreme Court, U.S.
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No. 02-978

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Under the pretense of addressing this Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, respondents have filed a supplemental brief. The lion's share of that brief has nothing to do with *State Farm* but instead merely repeats a meritless argument already contained in respondents' brief in opposition: that petitioners failed to preserve their claim that the $257 million punitive damages award in this case violates due process. Insofar as the supplemental brief *does* address *State Farm*, it grossly misconceives the decision's implications for this case. In this short response, we briefly explain why, at a minimum, a GVR in light of *State Farm* is required.

1. This Court's Rule 15.8 states that, although parties may file a supplemental brief "calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing," the brief "shall be restricted to new matter." Respondents' argument that petitioners failed to preserve their due process claims is in no way affected by the Court's decision in *State Farm*. Respondents' supplemental brief simply repeats and seeks to bolster arguments that respondents previously made or could have made. Worse, respondents' brief expressly refers to and purports to rebut arguments made in petitioners' reply brief. *See* Supp'l Br. 6-7. This Court's rules do not permit surreplies, and respondents should not be permitted to profit from filing one.

Besides, respondents' waiver argument is without any merit. Respondents' claim — that, supposedly because "Petitioners waived their federal constitutional claim," there "is a jurisdictional bar to this Court considering such claims," *id.* at 7 — has now been rejected *twice*: once when Justice Kennedy granted a stay, *see* Pet. App. 58a,

and once when the Court GVR'd in light of *Cooper*, *see id.* at 59a. We have already extensively explained why those two decisions were correct. *See* Pet. 13-17; Reply Br. 1-4; Reply Br. in No. 00-1875, at 7-10. There is no need to repeat that explanation here.

2. Respondents' suggestion (at 2) that *State Farm* "has no effect on the Georgia court's affirmance of the punitive damages award below" is transparently mistaken. At a minimum, *State Farm* establishes that, when there is a "substantial compensatory" award of which "a portion . . . contained a punitive element," a punitive award "at or near the amount of compensatory damages" is the constitutional maximum. *Id.* at 18; *see also id.* at 15 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."). The implications for this case are obvious: here, there is a compensatory damages award of $197 million (almost 200 times the "substantial" award in *State Farm*), the overwhelming majority of which "contained a punitive element," *see* Pet. 19-20; Reply Br. 6. Moreover, there is a punitive damages award of $257 million, almost twice as large as the punitive award in *State Farm*, and well in excess of the substantial compensatory award here.

While *State Farm*'s core holding thus establishes that, at a minimum, the outsized award here cannot stand, the balance of the Court's opinion makes clear just how far the award must be reduced (assuming punitive damages are permitted at all). *First*, the Court established that, to justify punitive damages, at least one of five factors must exist: physical harm, indifference to health or safety, a financially vulnerable victim, repeat conduct, or "intentional malice, trickery, or deceit" — and further held that even the "existence of any one of these factors . . . may not be sufficient." Slip op. 8. By that measure, the case for *any*

punitive award here is feeble to non-existent. *See* Pet. 17-19. The factor on which the Court of Appeals relied — petitioners' supposed "callous indifference to the financial well-being of [the] limited partners," Pet. App. 12a-13a — is simply insubstantial.

Second, besides establishing that a large compensatory award limits the amount of permissible punitive damages (particularly when the compensatory award "contained a punitive element"), *see* slip op. 15, 18, the Court established that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," *id.* at 17. That recognition is flatly at odds with the decision of the Georgia Court of Appeals, which found it quite significant that petitioners were "corporate entities with collective assets measured in billions of dollars." Pet. App. 15a.

Third, the Court made clear that, for third-guidepost purposes, it will not do to rely on criminal and civil penalties applicable to "dissimilar conduct." *See* slip op. 18. It will be recalled that the Georgia Court of Appeals found a supposed breach of fiduciary duty similar to conduct made unlawful by the state RICO statute on the theory that both involved "generally corrupt corporate behavior." Pet. App. 15a. Moreover, by indicating that even a 1:1 ratio can be too high, this Court flatly rejected the Georgia Court of Appeals' mistaken notion that constitutionally required notice of punitive liability exists whenever treble-damages statutes lurk in the wings. *See* Pet. 23-24.

3. Respondents are thus simply wrong to contest *State Farm*'s significance. At a minimum, this Court should GVR to give the Georgia courts an opportunity in the first instance to address the implications of *State Farm* for the punitive damages award in this case. A GVR may well be enough to set the Georgia courts on the right path: under

the circumstances, a second GVR should cause any state court to realize that the outsized verdict in this case must be drastically reduced. *Cf. Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (GVR can "serv[e] as a cautious and deferential alternative to summary reversal").

But respondents' supplemental brief suggests that, on remand, they will again argue that the Georgia courts should defy the clear import of this Court's precedents. Regrettably, the history of this case shows that the Georgia courts have been receptive to such arguments. Thus, it cannot be ruled out that respondents' prediction that "[t]here is no purpose but delay to be served by a GVR," Supp'l Br. 3, will become reality. If anything, then, respondents' supplemental brief reinforces the case for this Court's going beyond a GVR and entering an order providing a clear indication (unmistakable even to the Georgia Court of Appeals) that the award in this case cannot survive *State Farm*. *See* Pet. 21-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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